Supreme Court, U.S.
FILED
MAY 20 1998
CLERK

No. 97-1543

In The

# Supreme Court of the United States

October Term, 1997

GERALD B. LEFCOURT, P.C.,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

## BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI FILED BY GERALD B. LEFCOURT, P.C.

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## QUESTIONS PRESENTED

The Second Circuit held that attorneys who fail to report client-identifying information on cash transaction reports filed with the Internal Revenue Service are subject to a $25,000 penalty under 26 U.S.C. § 6721 for "intentional disregard" of filing requirements even if they had a good faith belief that the information was protected by the attorney-client privilege and therefore not required by the statute. The questions presented are:

1. Should the Court grant certiorari because the Second Circuit's conversion of the "intentional disregard" standard into one of "willfulness" eliminates consideration of the taxpayer's good faith belief that he is in compliance with the law?

2. Should the Court grant certiorari because the Second Circuit improperly applied a purely objective test in evaluating "reasonable cause" under the mandatory waiver provision of 26 U.S.C. § 6724, thus completely eliminating from § 6721 any consideration of a taxpayer's good faith belief that he is in compliance with the law?

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## BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI FILED BY GERALD B. LEFCOURT, P.C.

The National Association of Criminal Defense Lawyers ("NACDL") respectfully submits this brief as *amicus curiae* in support of the Petitioner in accordance with Supreme Court Rule 37.2. All parties have consented to this filing, and their written consents are filed with this brief.[1]

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## INTEREST OF THE *AMICUS CURIAE*

The NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's almost 10,000 direct members – and 80 state and local affiliate organizations with another 28,000 members – include private criminal defense lawyers, public defenders, active United States military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. Mr. Gerald B. Lefcourt is the current President of the NACDL.

The primary concern of *amicus* in this case is that the Circuit's decision places its members, and all defense attorneys, in a position at odds with their clients' interests under the threat of substantial penalty. The *Lefcourt* opinion effectively precludes any consideration of a good faith belief by the attorney that protection of his client's privilege is justified under applicable law. Moreover, by directly imposing a penalty, rather than employing an administrative summons seeking the identity of the client, the IRS forecloses any judicial testing of the privilege before the attorney subjects herself to substantial penalties.

The NACDL membership reports that the IRS is utilizing the *Lefcourt* standard on a nationwide basis to argue that any voluntary, as opposed to accidental, exclusion of client-identifying information on a Form 8300 subjects attorneys to substantial penalties, regardless of the attorney's good faith belief that the information is protected by the attorney-client privilege, and that he is therefore in compliance with the statute. The standard announced in *Lefcourt* is contrary to the plain language of the statute and caselaw from other circuits. This Court should therefore grant certiorari to ensure that a uniform standard governs this important issue.

## SUMMARY OF ARGUMENT

In two ways, Congress endeavored to ensure that the $25,000 penalty for failure to include information on a Form 8300 would not be imposed on a person whose failure to include the information was due to a good faith

belief that he was not required to disclose the information. First, Congress authorized the Internal Revenue Service ("IRS") to impose the $25,000 penalty only if the incomplete or incorrect filing was "due to intentional disregard of the filing requirement." 26 U.S.C. § 6721(e). Second, Congress provided that, in any event, the IRS *must* waive the penalty if the failure was "due to reasonable cause" and not "willful neglect." 26 U.S.C. § 6724(a). The Second Circuit ignored the plain language of the statute and held irrelevant a filer's good faith belief that he was not legally required to disclose information on a Form 8300.

The phrases "intentional disregard," and "reasonable cause" and not "willful neglect," are terms of art used throughout the Internal Revenue Code (the "Code") to set the standard by which the IRS evaluates whether to impose tax penalties in a variety of circumstances. The consequences of the Second Circuit's decision are thus widespread and severe. This Court should grant certiorari because the Second Circuit's decision is contrary to the plain language of the statute and decades of case-law construing that language.

## ARGUMENT

### I. The Court Should Grant Certiorari Because the Second Circuit's Interpretation of the Penalty Provision Is Contrary to the Plain Language of the Statute and Caselaw Construing that Language

#### A. The Statutory Scheme

Section 6050I of the Code requires a person who receives more than $10,000 in cash during a single trade or business transaction to file a form (Form 8300) reporting the name, address, occupation, and social security number of the payor, along with the date and nature of the transaction and the amount involved. 26 U.S.C. § 6050I. Section 6721 of the Code establishes a two-tiered system of potential penalties when a filer fails to include all of the required information on a Form 8300. First, the statute authorizes the IRS to impose a $50 penalty for "any failure to include all of the information required to be shown on the return or the inclusion of incorrect information." *Id.* § 6721(a)(2)(B). Any failure, regardless of the filer's intent, therefore implicates the $50 penalty. Second, the statute authorizes the IRS to impose a vastly harsher penalty – equal to the greater of $25,000 or the amount of cash received in the transaction – if the filer's failure to include all of the required information was "due to intentional disregard of the filing requirement." *Id.* § 6721(e)(2)(C).

Attorney Lefcourt filed a Form 8300 complete in all aspects except that he excluded client-identifying information. Lefcourt attached a detailed statement informing the IRS of his belief that he was not required to disclose this information because it was protected by the attorney-

client privilege. Rather than judicially test Lefcourt's claim of privilege through an administrative summons, the IRS directly penalized Lefcourt $25,000 for "intentional disregard" of the filing requirement.

### B. The Second Circuit's Interpretation of Intentional Disregard is Contrary to the Plain Language of the Statute

Congress chose the "intentional disregard" standard to govern imposition of a penalty under § 6721. In affirming Lefcourt's penalty, the Second Circuit replaced the two words chosen by Congress, "intentional disregard" with the single word "willful," which it defined as requiring only that a party act "voluntarily in withholding requested information, rather than accidentally or unconsciously." *Gerald B. Lefcourt P.C. v. United States*, 125 F.3d 79, 83 (2d Cir.1997) ("Thus, in our view, the 'intentional disregard' set forth in § 6721's penalty provision means conduct that is willful, a term which in this context *requires only that a party act voluntarily in withholding requested information*, rather than accidentally or unconsciously.") (emphasis added). In so doing, the Second Circuit improperly read the word "disregard" out of § 6721(e)(2)(C), rendering irrelevant Lefcourt's asserted good faith belief that he was in compliance with the statute. *See id.* ("Once it is determined, as it was here, that the failure to disclose client-identifying information was done purposefully, rather than inadvertently, *it is irrelevant that the filer may have believed he was legally justified in withholding such information.*") (emphasis added).

The terms "willful" and "intentional" are generally considered synonymous. See, e.g., *Kawaauhau v. Geiger*, 118 S. Ct. 974, 977 (1998) (equating "willful" and "intentional"); Black's Law Dictionary 1103 (abridged 6th ed.1990) (defining willful as voluntary, deliberate, or intentional). The word "disregard," however, has its own, independent meaning. Black's defines "disregard" as: "To treat as unworthy of regard or notice; to take no notice of; to leave out of consideration; to ignore; to overlook; to fail to observe." Black's Law Dictionary 327. Other definitions are similar. *See, e.g.*, The American Heritage Dictionary 669 (2d. ed.1991) ("[l]ack of thoughtful attention or due regard).

The Second Circuit held that "intentional disregard" "requires only that a party act voluntarily in withholding requested information." *Lefcourt*, 125 F.2d at 83. If Congress had intended to authorize the IRS to penalize a party for "voluntarily" withholding requested information, it would have used the word "intentional" by itself. Instead, the word "intentional" in § 6721 modifies the word "disregard," indicating that the penalty may be imposed only for a deliberate or intentional *disregard* of a filing requirement, not merely a voluntary or intentional act that results in a failure to comply with a filing requirement. *See Kawaauhau*, 118 S.Ct. at 977 ("The word 'wilful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.").

When the words "intentional" and "disregard" are read together their meaning is plain and unambiguous. "Intentional disregard occurs when a taxpayer who

knows or should know of a rule or regulation *chooses to ignore its requirements.*" *Crowd Management Serv. v. Deloretto*, 889 F.Supp. 1313, 1317 (D.Or.1995) (quoting *Hansen v. Commissioner*, 820 F.2d 1464, 1469 (9th Cir.1987) (emphasis added)). *See also Marcello v. Commissioner*, 380 F.2d 499, 506 (5th Cir.1967), *cert. denied*, 389 U.S. 1044 (1968). The Second Circuit improperly read "disregard" out of the statute. *Cf. Commissioner v. Acker*, 361 U.S. 87, 91 (1959) ("We are here concerned with a taxing Act which imposes a penalty. The law is settled that 'penal statutes are to be construed strictly,' and that one 'is not to be subjected to a penalty unless the words of the statute plainly impose it.' ") (footnote and citations omitted).

In determining that "disregard" has no meaning in the statute, the Second Circuit relied solely on an IRS regulation equating "willfulness" with "intentional disregard." *Lefcourt*, 125 F.3d at 83 (citing 26 C.F.R. § 301.6721-1(f)(2)(ii)). Because the term "intentional disregard" is unambiguous, and has a meaning other than that ascribed to it by the IRS, the court erred in deferring to the IRS's interpretation of the term. *See Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

Lefcourt maintained that he was not required to include his client's name on the Form 8300 because it was privileged. If Lefcourt believed in good faith that he was in compliance with the law, then he did not intentionally "disregard," "ignore," or "overlook" the law's requirements. Because the Second Circuit improperly read the word "disregard" out of the statute, and decided the case as a pure question of law affirming a grant of summary

judgment, Lefcourt's asserted good faith belief in his position was never evaluated by a trier of fact.

The Second Circuit's disregard of Congress' chosen formulation of the state of mind necessary for imposition of a $25,000 penalty has important ramifications for the defense bar. An attorney who seeks to protect his client's privilege based upon a good faith belief in the existence of the privilege faces a Hobson's choice between his client's interest and his own pecuniary interest in avoiding a substantial penalty. Under the Second Circuit's formulation, the penalty attaches so long as the attorney acted knowingly and not accidentally or unconsciously. Through its use of the term "disregard," modified by the term "intentional," Congress expressly limited the IRS' penalty authority. The Second Circuit ignored this express limitation, and, consequently, rendered irrelevant a filer's good faith belief in the existence of the privilege.

### C. The Second Circuit's Interpretation of "Intentional Disregard" is Contrary to Caselaw Interpreting that Term

The term "intentional disregard" also has a settled meaning in the cases. Courts have consistently interpreted the term to mean that the filer knew or should have known that the information was legally required, and nevertheless deliberately chose to omit the required information. Under this definition, courts have consistently held that the good faith of the filer is a defense to the penalty. In particular, courts have held that a good faith misunderstanding of the law is a defense to an intentional disregard penalty.

### 1. Tax Cases

Congress uses the term "intentional disregard" throughout the Code to set the standard by which the IRS is authorized to penalize taxpayers, tax preparers, and others required to file information with the IRS. Former sections 6653(a)(1) and (a)(2) of the Code, for example, imposed an addition to tax if any part of any underpayment was due to negligence or intentional disregard of rules or regulations.[2] The courts have long recognized that a reasonable or good-faith misunderstanding of the law is a defense under these sections. *See, e.g., Heasley v. Commissioner*, 902 F.2d 380, 383-84 (5th Cir.1990) (tax court erred in assessing penalty under § 6653(a) given the petitioners' "honest misunderstandings of law and fact, their reliance on financial advisors, and their efforts to monitor their investment") (internal citation omitted); *Haman v. Commissioner*, 500 F.2d 401, 403 (9th Cir.1974) (reversing penalty assessment under § 6653(a) because, "while the taxpayers were misguided and unsophisticated in the realm of tax law, they acted in good faith, without negligence and without 'intentional disregard' of applicable rules and regulations"); *Yelencsics v. Commissioner*, 74 T.C. 1513, 1533 (1980) (reversing imposition of

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[2] Former § 6653(a)(1) imposed an initial fine of 5 percent of the underpayment and former § 6653(a)(2) imposed a further addition of 50 percent of the interest payable on the portion of the underpayment attributable to negligence or intentional disregard. I.R.C. § 6653 was repealed by the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106, § 7721(c)(2), effective for returns due after 1989. Negligence and intentional disregard are now components of the accuracy-related penalty found in I.R.C. § 6662.

addition to tax under section 6653(a) because the "underpayment was not due to negligence or intentional disregard of rules and regulations, but solely to a good-faith misunderstanding of the law") (citing *Wofford v. Commissioner*, 5 T.C. 1152, 1166-67 (1945)); *Brockman Building Corp. v. Commissioner*, 21 T.C. 175, 191 (1953) (no liability under former § 293, the precursor to § 6653(a), because "petitioner has shown enough to establish that it acted in good faith in not reporting the percentage payments as its income"); *Sampson v. Commissioner*, 60 T.C.M. (CCH) 715, 1990 Tax Ct. Memo LEXIS 540, *6 (1990) (petitioners not liable under §§ 6653(a)(1) and (2) because "[w]e are satisfied that petitioners' underpayment was not due to negligence or intentional disregard, but solely to a reasonable or good-faith misunderstanding of the law").

Similarly, courts have held that, by itself, a taxpayer's good faith reliance on expert opinion is a defense to a negligence or intentional disregard penalty under § 6653, even if the advice is wrong. *See, e.g., McMurray v. Commissioner*, 985 F.2d 42 (1st Cir.1993) (noting that "[r]easonable reliance on expert opinion, asserted in good faith, can shield a taxpayer from section 6653(a) penalties[,]" (citing *United States v. Boyle*, 469 U.S. 241, 250 (1985)) and concluding "that the record lacks sufficient evidence of bad faith to support the tax court's negligence ruling");[3]

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[3] In *Boyle*, the Court suggested that the good faith reliance of counsel concerning a question of law might constitute "reasonable cause" for an erroneous filing, and noted that "[c]ourts have frequently held that 'reasonable cause' is established when a taxpayer shows that he reasonably relied on the advice of an accountant or attorney that it was unnecessary to file a return, even when such advice turned out to have been mistaken." *Boyle*, 469 U.S. at 250 (collecting circuit court cases).

*Heasley*, F.2d at 303; *Collins v. Commissioner*, 857 F.2d 1383, 1386 (9th Cir.1988); *Goudas v. IRS*, 1996 WL 732829 (U.S. Tax Ct. Dec. 23, 1996) (reasonable, good faith reliance on advice of accountant is defense to intentional disregard penalty under former § 6653(a)(1)), *aff'd on other grounds*, 137 F.3d 368 (6th Cir.1998).

The term "intentional disregard" should be given a consistent meaning throughout the Code. As two commentators have noted:

> No definition of the term 'intentional disregard' is provided in new Sections 6721-6724 imposing these penalties. It appears that the existing, albeit ambiguous, definition of that term as it arises in the general area of negligence penalties will apply. *For example, an unintentional disregard of rules, such as a mistake in interpretation of law or facts made in good faith, will not result in the penalty.*

Robert Greisman and Gary Schaider, *Many Penalties Substantially Increased as a Result of the Tax Reform Act of 1986*, 15 Tax'n for Law. 228 (Jan./Feb. 1987) (emphasis added).[4]

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[4] Congress has also endorsed this uniform construction of "intentional disregard." Section 6694(a) authorizes the IRS to impose a $100 penalty against a tax preparer whose negligent or intentional disregard of rules or regulations results in a tax underpayment. *See* 26 U.S.C. § 6694(a). The legislative history explains the penalty:

> The penalty applies generally to every negligent or intentional disregard of such regulations and rulings *except that a good faith dispute by an income tax return preparer about an interpretation of a statute (expressed in regulations or rulings) is not considered a negligent or intentional disregard of rulings and regulations.* The

The Second Circuit's definition of "intentional disregard" eviscerates the established distinction in tax cases between a good faith belief that one's conduct is in conformity with the law (which negates a finding of willful or intentional disregard) and a good faith belief that the law itself is invalid (which does not). In this respect, *Lefcourt* is inconsistent with the Second Circuit's own precedent.

In *Druker v. Commissioner*, 697 F.2d 46 (2d Cir.1982) (Friendly, J.), *cert. denied*, 461 U.S. 957 (1983), married taxpayers filed a tax return claiming the benefit of the lower rate applicable to single taxpayers on the grounds that the distinction was unconstitutional. The IRS subsequently asserted a penalty under § 6653(a) for intentional disregard of the filing requirement. The Second Circuit held that the penalty was applicable to the Drukers because, although they believed the statute was illegal, they in fact knew that, as written, it applied to them. The court carefully distinguished the situation, however, where a taxpayer believes that his conduct is in conformity with the statute, citing several cases for the proposition that a taxpayer has not intentionally disregarded a

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> provision is thus to be interpreted in a manner similar to the interpretation given the provision under present law (sec. 6653(a)) relating to the disregard of rules and regulations by taxpayers on their own returns.

H.R. Rep. No. 94-658, 94th Cong., 2d Sess. 278, reprinted in 1976 U.S.C.A.A.N. at 3174 (emphasis added); *see also* S.Rep. No. 94-938, 94th Cong. 2d Sess. 355, reprinted in 1976 U.S.C.A.A.N. at 3784.

statute or regulation where he "believed, albeit erroneously, that what [he] had done complied with the regulations." *Druker*, 697 F.2d at 54 (citing *Commissioner v. S.A. Woods Machine Co.*, 57 F.2d 635 (1st Cir.1932), *Brockman Building Corp.*, 21 T.C. at 191, and *Scott v. Commissioner*, 61 T.C. 654 (1974)).

**2. Non-Tax Cases**

The term "intentional disregard" is used in a variety of other contexts to gauge a party's liability. Like the tax cases, courts have consistently interpreted the term to mean that a party knew or should have known of his legal obligation, and consciously and deliberately chose to disregard or ignore that obligation. These cases teach that a good faith, although erroneous, belief that one's conduct is *in compliance* with applicable rules and regulations negates a finding of intentional disregard. *See, e.g., Donovan v. Mica Constr.*, 699 F.2d 431-32 (8th Cir.1983) (no "intentional disregard" of OSHA requirements, and accordingly, "no willful violation of the standard," where employer had good faith, although erroneous, belief that trenches were exempt from OSHA); *United States v. Loyd*, 721 F.2d 331, 333 (11th Cir.1983) (per curiam) (refusing to suppress evidence discovered pursuant to search warrant issued in violation of Rule 41 of the Federal Rules of Criminal Procedure because there was "no evidence to indicate bad faith or an intentional disregard of the rule"). *See also United States v. Freeman*, 897 F.2d 346, 350 (8th Cir.1990) (endorsing same standard); *United States v. Comstock*, 805 F.2d 1194, 1207 (5th Cir.1986) (same), *cert. denied*, 481 U.S. 1022 (1987).

Based on the foregoing considerations, this Court should grant certiorari to decide whether the Second Circuit's interpretation of "intentional disregard" is contrary to the plain meaning of the statute and the settled understanding of the term in caselaw.

## II. The Court Should Grant Certiorari Because the Second Circuit Improperly Applied a Purely Objective Test in Evaluating "Reasonable Cause" under the Mandatory Waiver Provision of 26 U.S.C. § 6724

Section 6724(a) of the Code requires a mandatory waiver of the "intentional disregard" penalty when the failure is due to "reasonable cause." "No penalty shall be imposed under this part with respect to any failure if it is shown that such failure is due to reasonable cause and not to willful neglect." 26 U.S.C. § 6724(a). Under the Second Circuit's analysis, the filer's subjective good faith belief that he is in compliance with the law's requirements is considered in neither the "intentional disregard" nor the "reasonable cause" standard. As demonstrated above, this construction is contrary to the plain language of the statute and the caselaw. As demonstrated below, it is an unworkable standard for a national program.

The Second Circuit interpreted "reasonable cause" as a purely objective standard. *See Lefcourt*, 125 F.3d at 84 (stating the test as whether the filer's reason for failing to include the information was "objectively reasonable under the circumstances"). Under the Second Circuit's interpretation of "reasonable cause" the filer's objective reasonableness is evaluated by the court solely by reference to that circuit's precedent. Thus, the Second Circuit

analyzed its precedent and, interpreting its cases, *read together*, concluded that, as a matter of law, Lefcourt should have known that his argument would not prevail, and therefore that he did not act as a reasonably prudent attorney would act under the circumstances. *Id.* at 88-89.

The Second Circuit's analysis of "reasonable cause" fundamentally misconstrues the attorney's role in the adversary process. As the Fifth Circuit has explained:

> One of the basic tenets of our adversarial legal system is that the lawyer owes the client loyalty and zealous representation. *That duty includes advocating positions which the lawyer in good faith believes have an arguable basis despite contrary authority.* It also includes confidentiality: as a general rule, the lawyer may not divulge client confidences except in very limited instances. These ethical obligations are enforceable; a lawyer violating them may find himself before the state Supreme Court facing sanctions up to and including disbarment.

*United States v. Cavin*, 39 F.3d 1299, 1308 (5th Cir.1994) (emphasis added). *See also* Code of Professional Responsibility DR 4-101; Model Rules of Professional Conduct Rules 1.6 & 1.8(b).

In the early 1990s, a host of federal circuit and district courts addressed the parameters of the "special circumstances" exception to the general rule that client identity is not privileged. *See, e.g., United States v. Sindel*, 53 F.3d 874, 876 (8th Cir.1995); *Ralls v. United States*, 52 F.3d 223 (9th Cir.1995); *United States v. Leventhal*, 961 F.2d 936 (11th Cir.1992); *In re Grand Jury Subpoenas (Anderson)*,

906 F.2d 1485, 1491 (10th Cir.1990); *United States v. Gertner*, 873 F.Supp. 729, 735-736 (D.Mass.), *aff'd on other grounds*, 65 F.3d 963 (1st Cir.1995); *United States v. Monnat*, 853 F.Supp. 1301, *dismissed as moot*, 853 F.Supp. 1304 (D.Kan.1994). Lefcourt argued, *inter alia*, that his client's identity was privileged under the "legal advice" exception, which holds that client-identifying information is privileged "where there is a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought." *Anderson*, 906 F.2d at 1488. The Second Circuit interpreted its prior decisions in *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501 (2d Cir.1991) and *Grand Jury Subpoena Duces Tecum Served Upon Gerald L. Shargel*, 742 F.2d 61 (2d Cir.1984), *"read together,"* as rejecting this argument. *Lefcourt*, 125 F.2d at 86 (emphasis added).

The court's analysis of *Goldberger* and *Shargel* demonstrates the untenable position in which *Lefcourt* places attorneys. This is because, regardless of how much *Goldberger* and *Shargel* may have clarified the "special circumstances" question, the cases were decided in 1991 and 1984, respectively, and the court's subsequent decision in *Vingelli v. United States*, 992 F.2d 449 (2d Cir.1993) obfuscated the issue. After acknowledging that client identity is privileged under "special circumstances," the *Vingelli* court stated:

> What those 'special circumstances' are that would protect this information has not been precisely defined. What they are remains as enigmatic as the smile that Leonardo Da Vinci left us on the face of the Mona Lisa. In light of defense counsel's argument, our task is to examine the

> special circumstances rules to see if they apply in the present case.

*Vingelli*, 992 F.2d at 450. A reasonable attorney reading this language would believe that the issue of "special circumstances" was still very much open in the Second Circuit. The only question would be whether *Vingelli* itself clarified the issue.

*Lefcourt* suggests that it did, but the court's careful choice of language belies the suggestion. Of the legal advice exception, the court states: "In fact, we all but categorically rejected it in *Vingelli* . . . , where we took pains to distinguish the legal advice exception from the confidential communications exception that is recognized in this circuit." *Lefcourt*, 125 F.2d at 87. The words "all but" are critical because, in fact, *Vingelli* neither embraced nor rejected the legal advice exception. Rather, in dicta, it simply noted that the legal advice exception was originally adopted and then later limited by the Ninth Circuit. *Vingelli*, 992 F.2d at 452-53. It appears, therefore, that the Second Circuit's purely objective test of "reasonable cause" requires that an attorney must review not only the pertinent circuit's *rulings* on the attorney-client privilege, but also must interpret the language used in the court's cases and correctly predict how the court will rule in the future.

The Second Circuit's limited definition of "intentional disregard" rendered irrelevant Lefcourt's asserted good faith belief that he was in fact complying with the filing requirement, so long as he acted consciously rather than accidentally. The Second Circuit then compounded its error by formulating a test under the mandatory

waiver provision that also ignored the filer's good faith belief that he is in compliance with the law. The statute as a whole cannot fairly be read as precluding, under both the "intentional disregard" and mandatory waiver provisions of § 6721 and § 6724, consideration of a taxpayer's good faith belief that he is in compliance with the law.

The Second Circuit's formulation is an unworkable standard for a national penalty program. For example, a New York lawyer who is paid in cash by a client in Louisiana must comply with two different rules governing attorney-client privilege. *Compare In re Grand Jury Subpoena (DeGuerin)*, 926 F.2d 1423, 1432 (5th Cir.1991) (identity of client who paid another client's fee privileged) *with In re Grand Jury Subpoena (Doe)*, 781 F.2d 238, 249 (2d Cir.1986) (en banc) (benefactor identity not privileged), *cert. denied*, 475 U.S. 1108 (1986). Because the Fifth Circuit recognizes broader protection of client identity than the Second Circuit, the attorney in this situation would be bound by state ethical rules not to reveal his client's identity. Under *Lefcourt*, however, the attorney would then be subject to a $25,000 penalty by the IRS.

The IRS has available to it a much less intrusive means to enforce the disclosure requirements of 26 U.S.C. § 6050I. Indeed, prior to the IRS's imposition of a fine against Lefcourt, a settled practice had emerged in the cases whereby the government would first seek the withheld information by summons or grand jury subpoena. *See, e.g., Sindel*, 53 F.3d 874; *Ralls*, 52 F.3d 223; *Leventhal*, 961 F.2d 936; *In re Grand Jury Subpoena (Anderson)*, 906 F.2d 1485; *In re Grand Jury Subpoena (DeGuerin)*, 926 F.2d 1423 (5th Cir.1991); *In re Grand Jury Proceeding (Cherney)*, 898 F.2d 565 (7th Cir.1990); *Gertner*, 873 F.Supp. at

735-736; *Monnat*, 853 F.Supp. at 1301. Under this procedure a neutral fact-finder – a district court judge – decides whether the information should be disclosed. In many instances, the district court makes its decision only after an *in camera* review of the factual predicate supporting the assertion of privilege. *See, e.g., Sindel*, 53 F.3d at 876. This settled procedure enables the attorney to properly balance his ethical obligations to his client with his duty to obey federal law.

## CONCLUSION

For the foregoing reasons, and the reasons included in the Petition for Writ of Certiorari, this Court should grant certiorari to decide whether the Court of Appeals' decision is contrary to the plain language of the statute and the caselaw.

Respectfully submitted,

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